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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DIETRIC DAVIS, Plaintiff and Appellant, v. CALIFORNIA GUARDIAN, INC., Defendant and Respondent.	B294819 (Los Angeles County Super. Ct. No. BC678008)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

JML Law and Jennifer A. Lipski for Plaintiff and Appellant.

Gutierrez, Preciado & House and Calvin House for Defendant and Respondent.

INTRODUCTION

In June 2015, respondent California Guardian Inc. (CGI), a small business offering fire suppression services, hired appellant Dietric Davis as the second of two pipefitters. Pipefitters (also known as "fitters") inspect, test, maintain, and repair fire suppression systems. CGI's pipefitters worked mostly at the site of its biggest client, Lockheed Martin (Lockheed). Lockheed's contract with CGI ended in late 2015, after which CGI would need to bid for a new contract.

In late September 2015, Davis injured his back while changing fire sprinkler heads for CGI's second largest client. His doctors subsequently imposed medical restrictions which, if followed, effectively precluded him from performing many of the physical aspects of a pipefitter's job. As Davis still wanted to work -- he was paid by the hour -- he suggested to his supervisor that he be permitted to do paperwork and perform inspections. But Davis's pipefitter position required only a minimal amount of paperwork; assigning him more paperwork would have cut other employees' hours. Similarly, restructuring Davis's job to permit him to do more inspections would necessarily have meant restructuring other employees' jobs to do the pipefitting work Davis was now less able to do. Thus, while CGI permitted Davis to do all the paperwork required for his job, once that was finished, the only work remaining for him was the physical aspects of pipefitting. If Davis was unable to do the pipefitting, CGI allowed him to clock out and go home without penalty. Nevertheless, Davis

often chose to stay and do the pipefitting because he wanted to work the same number of hours as before his injury.

After Lockheed awarded CGI the contract for 2015-2016, CGI terminated Davis in December 2015, explaining that there would be only enough work for one pipefitter at Lockheed in the coming year. Indeed, following Davis's termination, CGI hired no other employees in any capacity.

In September 2017, Davis sued CGI, alleging several causes of action relating to disability discrimination and CGI's failure to accommodate Davis's disability. CGI moved for summary judgment, arguing that Davis could not establish a prima facie case of discrimination, that CGI had terminated Davis's employment for a legitimate reason, and that CGI had done everything possible to accommodate Davis's disability. The trial court granted CGI's motion for summary judgment and entered judgment in its favor. Davis appealed. We affirm.

STATEMENT OF RELEVANT FACTS

A. *Background*

CGI had been inspecting, testing, and certifying the fire protection systems and alarms for some of Lockheed's facilities since the end of 2012. CGI's work with Lockheed was performed pursuant to a contract, which, per Lockheed requirements, was required to be put out for bid in October 2015. Lockheed was CGI's biggest client, accounting for a significant majority of its gross sales.

It is undisputed that a pipefitter's primary duties for purposes of CGI's contract with Lockheed were inspecting, testing, maintaining, and repairing Lockheed's fire suppression systems, and that pipefitting was "physical work." In June 2014, a year before hiring Davis, CGI hired Jose Valdez. Though Davis testified at deposition that Valdez was an apprentice pipefitter who did inspections and testing (as opposed to Davis, who was a full pipefitter), in opposing summary judgment, Davis did not dispute that Valdez "has performed the duties of a fitter for purposes of the contract with Lockheed since [he was hired], which include inspection, maintenance, and repair of Lockheed's sprinkler systems, and the occasional installation of additions or modifications to Lockheed's existing systems."

B. *CGI Hires Davis*

CGI hired Davis in June 2015 as a second pipefitter. A contract dated July 1, 2015, stated his duties included "[f]ire sprinkler service and repair, and fire alarm testing and repair." The contract had no specific duration and provided that Davis would be paid an hourly wage. At least 80% of Davis's work for CGI was performed at Lockheed. When Davis was hired, CGI employed nine other people: Bill Birkholz (the president), Birkholz's wife, Birkholz's son, Robert Hernandez (Davis's supervisor), Valdez, Anita Hernandez (CGI's secretary), Ted Cruz (fire suppression technician), Richard Guerrero (system technician), and "Paul" (who installed fire sprinklers for kitchens). To Davis's

knowledge, Paul remained employed by CGI the entire time Davis worked for CGI. Davis was the last employee hired by CGI in any capacity; no one else was hired during his time with CGI, and no one was hired after he was terminated.

On September 17, 2015, Birkholz received an e-mail from Hernandez, Davis's supervisor, relating four incidents of misconduct by Davis: (1) smoking in his vehicle on Lockheed property even after he was reminded that it was prohibited; (2) at least twice leaving pumps unattended during fire-pump testing (also known as "[p]ump [r]uns"); (3) using profanity in front of Lockheed employees; and (4) dropping tools from the top of a ladder without warning, almost hitting Valdez in the head, even when specifically asked to at least warn Valdez if he would be dropping tools. Because this was the first report of misconduct, Birkholz did not issue a written warning, opting instead to speak with Davis regarding the issues. Davis admitted to smoking in his vehicle on Lockheed's property, but claimed not to know it was prohibited. He denied using profanity, and testified no one had trained him that he needed to be physically present for the entirety of a pump run. He claimed the tools accidentally fell out of his back pocket.

C. *Davis Is Injured*

On September 26, 2015, Davis injured his back while replacing sprinkler heads for CGI's second largest client. He initially went to a chiropractor, who provided temporary relief, but by the time he arrived home from the visit, he was

in such pain that he could not walk. At some point thereafter, he went to a medical doctor. An October 21, 2015 medical report stated that Davis was diagnosed with sciatica and lower back strain, was to stay off work until October 23, and was thereafter to be placed on "light duty." He rated his pain level as 9 out of 10, and his "Expected Maximum Medical Improvement (MMI) date" was projected to be November 18, 2015.[1] At a follow-up appointment two days later, despite reporting he had "[n]ot improved significantly" and his pain level was unchanged, he was told he could return to work with "[l]imited standing or walking" but also that he could "sit and stand at will." He received a "work status" medical report to this effect, which he provided to Hernandez. The "work status" report also stated: "In the event that your employee has restrictions and no modified work is made available, employer must keep employee off work unless, and until, such modified work is made available."

When Hernandez stated he did not know what work Davis could perform with these restrictions, Davis suggested he could do paperwork or perform inspections; Hernandez agreed to speak with Birkholz about these ideas. Davis testified he himself spoke with Birkholz at least three to four times about his work restrictions, though Birkholz never had

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[1] Maximum medical improvement means the point when the employee's condition "is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." (*Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2008) 159 Cal.App.4th 483, 488, fn. 3.)

any suggestions regarding what Davis could do. However, Davis admitted neither Hernandez nor Birkholz ever refused to speak with him about work modifications.

The paperwork required for Davis's position was minimal, and it is undisputed he could not be given more without cutting hours for other employees. After Davis completed his paperwork, there would be no other "light duty" work for him to perform, and he would be told the only other work was pipefitting work; as Davis testified, "there was work to be done." If Davis did not want to do the pipefitting work, he was permitted to clock out and go home without repercussion. However, rather than go home, Davis would sometimes stay and do pipefitting because he wanted to work the same number of hours he had previously worked. Davis testified that he never told anyone at CGI he was unable to do the tasks he did perform, but that he performed only those tasks he felt he could do with his restrictions. He was never disciplined for not doing a task or taking time off work, and was never refused time off work. Davis acknowledged that while he often performed pipefitting work to keep up his hours, he was unable to do that work "on a continuous basis."

On October 29, 2015, Davis reported to his doctor that he was not being given much "light duty" work, and his condition had worsened; he rated his pain level as 10 out of 10. The attending doctor noted, "I spoke with the patient[']s supervisor, informed him that I would be taking the p[atien]t off work for the next few days, and when he returned to work, that I would be limiting him to a sitting job, which is

available to him." Davis was told to stay off work until November 2. On November 2, Davis rated his pain as 8 out of 10, and asked the doctor to prescribe him more time off. The doctor noted that a "sitting job" was available to Davis "according to his boss," but that Davis himself stated "'there is no work for me there.'" The doctor concluded that if he sent Davis back to work, and there was no sitting work available, Davis would be sent home, which was Davis's desired result. Therefore, the doctor maintained Davis's "work restrictions to sitting work only." Neither of these reports was provided to CGI.

On November 9, 2015, Davis's medical documentation states he had "[i]mproved as expected" and his pain was now 5 out of 10. His Expected MMI date remained November 18, 2015, and he also reported he had "start[ed] a sit down job today as he is improving." His work restrictions now stated: "patient should work in a sit down job." He received a "work status report" to this effect, which again provided he should be "ke[pt] . . . off work" if there was no suitable work available. This status report was provided to CGI.

On November 17, 2015, Davis's medical documentation shows his pain level had risen to 7 out of 10. The Expected MMI date was still listed as November 18, 2015, but his "[r]estrictions for return to modified work" were now "frequent change of position as tolerated. [N]o sitting for long periods." On November 24, 2015, his medical documentation reflected a change in the Expected MMI date to December 29, 2015, and his work restrictions were now "frequent change of

position as tolerated. [N]o sitting for long periods[. ¶] Limited stooping and bending[. ¶] Limited kneeling or squatting[. ¶] No Lift." His pain level had increased to 8 out of 10. On November 30, 2015, Davis's Expected MMI date and restrictions remained the same, but his pain level rose again -- it was now 9 out of 10.[2] Davis also testified that sometime before Thanksgiving (November 26 in 2015), he was told by a doctor that driving 90 minutes to work each way as he was doing would worsen his sciatica, and so the "doctor placed him off work for a week or two." It is unclear exactly when this occurred, but according to the timesheets in the record, the last day Davis performed work for CGI was November 18, 2015.

D. *CGI Terminates Davis*

In late October 2015, CGI received Lockheed's request for proposal regarding a new contract for fire-prevention services, which consisted of various job types, such as "Pipe/Sprinkler Fitter," "Apprentice – Pipe/Sprinkler Fitter," and "Fire Alarm Technician," and the number of "[s]traight [t]ime" and overtime hours that Lockheed anticipated it would need for each position. Lockheed estimated it would need 1,500 hours of straight time and 1,500 hours of overtime for a pipefitter, and 500 hours of straight time and 500 hours of overtime for an apprentice pipefitter. Bidders were to fill

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[2] It is undisputed that the only documents Davis provided to CGI about his work restrictions were the October 23 and November 9, 2015 medical status reports.

in the hourly rate they would charge for both straight time and overtime for each listed position. CGI submitted its bid on November 9.

On November 16, 2015, before Lockheed awarded the new contract to CGI, Davis was late for a pump run at Lockheed because he overslept. In response, CGI issued a written "Notice of Probation," which stated Davis was being placed on probation not only because of his tardiness to the pump run, but also because he had smoked on Lockheed property and left other pump runs unattended (issues noted in Hernandez's September 17 e-mail to Birkholz).

A few days after Davis was late for the pump run, Lockheed awarded CGI the contract for the next year. Birkholz attested that "[g]iven the budgeted hours by Lockheed for the position of fitter, I did not have enough work to keep both Valdez and Davis on staff full time. The hours estimated by Lockheed amounted to 30 hours of work a week. I chose to lay off Davis, as Valdez had more seniority, having been with [CGI] a year longer, and based upon Davis'[s] conduct in his brief tenure with [CGI], specifically, the incidents referenced in the September 17, 2015 email . . . , and those in the November 16, 2015 Notice of Probation . . . ." Davis received a letter dated December 2, 2015, stating CGI's "largest account" had requested CGI "lessen the amount of hours to only include 30-40 hours a week for one fitter," and therefore CGI needed to "let you go as we do not have enough work to support two fitters at this time." Davis agrees he was the most junior employee when he was terminated, but

disputes the number of hours of pipefitting work estimated by Lockheed.

E. *Davis Sues CGI*

In September 2017, Davis filed a complaint against CGI alleging seven causes of action: (1) Discrimination in Violation of FEHA; (2) Failure to Accommodate in Violation of FEHA; (3) Failure to Engage in the Interactive Process in Violation of FEHA; (4) Failure to Prevent Discrimination in Violation of FEHA; (5) Retaliation in Violation of FEHA; (6) Wrongful Termination in Violation of FEHA; and (7) Wrongful Termination in Violation of Public Policy. His complaint contained the allegations that: he was hired as a pipefitter on June 1, 2015, and suffered a back injury while working on September 26, 2015; he was "unable to work due to his injury and [CGI] refused to accommodate [him] with the leave he requested to recover from his injury"; and with reasonable accommodations, Davis "could have fully performed all duties and functions of his job." CGI answered the complaint in December 2017.

In June 2018, CGI moved for summary judgment, arguing that: Davis could not establish a prima facie case of disability discrimination because he was unable to perform the essential functions of a pipefitter and was not fired due to his disability; Davis was given all the medical leave he requested; Davis was provided paperwork to do until CGI was "'caught up'" with paperwork, and the remaining paperwork was part of other employees' jobs; Davis was fired because

Lockheed needed only one pipefitter under the new Lockheed contract; and CGI chose to terminate Davis over Valdez because Valdez had been with CGI longer, and Davis had suffered several disciplinary issues.

In support of its motion, CGI submitted a declaration from Samuel Davila, Lockheed's Plant Engineering Supervisor who was responsible for the contract with CGI (including verifying its employees' timesheets for work performed for Lockheed) and had formulated the bid form, stating that "[i]n my oversight of the work performed by Mr. Davis and Mr. Valdez, I determined that [the] use of two fitters - Mr. Valdez and Mr. Davis - was unnecessary and economically wasteful for Lockheed. As such, in the Bid for 2015-2016 (Exh. 2), I estimated that Lockheed only had need for one full-time fitter to perform the services for the same time period."

After Davis opposed the motion and CGI replied, the court granted the motion in September 2018, issuing a one-page minute order stating only that it found "no triable issues of fact." Judgment was entered on October 17, 2018, and Davis timely appealed.

MOTION TO AUGMENT

In March 2020, CGI filed an unopposed motion to augment the record, noting that the copy of Davis's "Compendium of Evidence" in opposition to summary judgment included in the record on appeal was incomplete, because it omitted "Exhibit 1" (portions of Birkholz's

deposition), and asking to augment the record with the missing exhibit. We grant the motion.

DISCUSSION

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).)

A. *Discrimination Claims*

1. First Cause of Action (FEHA Discrimination)

(a) Governing Principles

"In analyzing claims of discrimination under FEHA, California courts have long used the three-stage burden-shifting approach established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 . . . ." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181 (*Husman*).) "Under the *McDonnell Douglas* test a plaintiff may establish a prima facie case for

unlawful discrimination by providing evidence that '(1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought or was performing competently in the position he [or she] held, (3) he [or she] suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.' [Citations.] 'Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. [Citation.] A reason is "'legitimate"' if it is "facially unrelated to prohibited bias, and which if true, would thus preclude a finding of discrimination." [Citation.] If the employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.' [Citation.]" (*Ibid.*)

"In the context of summary judgment an employer may satisfy its initial burden of proving a cause of action has no merit by showing either that one or more elements of the prima facie case 'is lacking, or that the adverse employment action was based on legitimate nondiscriminatory factors.' [Citations.] '[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.'" (*Husman*, *supra*, 12 Cal.App.5th at 1181-1182.) If an employer's motion for summary judgment

"relies in whole or in part on a showing of nondiscriminatory reasons for the [adverse employment action], the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the [adverse action]. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098.)

"[I]f nondiscriminatory, [employer]'s true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons [citation] in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding *of discrimination*." (*Guz*, *supra*, 24 Cal.4th at 358.)

(b) Analysis

In its motion for summary judgment, CGI argued both that Davis could not establish a prima facie case for discrimination, and that it had proffered a legitimate reason for his termination. On appeal, Davis argues the trial court erred in granting summary adjudication of his first cause of action because: (i) he presented sufficient evidence to

establish a prima facie case of disability discrimination; and (ii) there was at least a triable issue of fact regarding the veracity of CGI's proffered reason. We conclude Davis failed to rebut CGI's showing that he could not establish a prima facie case of disability discrimination and, in any case, failed to raise a triable issue of fact that the proffered reason for his termination was a pretext for disability discrimination.

(i) Prima Facie Case

A plaintiff demonstrates a prima facie case for disability discrimination "by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310.) CGI argued Davis could not present evidence demonstrating either the second or third element. Because we conclude Davis could not make a prima facie showing that he could perform the essential duties of his job (the second element), we need not consider whether he would have been able to make a prima facie showing that CGI terminated him due to his disability (the third element).

"An employer may discharge . . . a person who, because of a disability or medical condition, 'is unable to perform his or her essential duties even with reasonable

accommodations.'" (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926-927.) A person is unable to perform his essential duties if he cannot do them "efficiently, safely, and without danger to health . . . ." (*American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 609; see also Gov. Code, § 12940, subd. (a)(1) [law "does not prohibit an employer from . . . discharging an employee with a physical . . . disability, or subject an employer to any legal liability resulting from . . . the discharge of an employee with a physical . . . disability, if the employee, because of a physical . . . disability, is unable to perform the employee's essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger the employee's health or safety"].)

Davis was employed as a pipefitter. While he contends that CGI failed to establish the essential functions of a pipefitter, in opposing summary judgment, he did not dispute that his "primary duties . . . consist[ed] of inspecting, maintaining, and repairing Lockheed's existing fire suppression systems, and making minor additions or modifications thereto," which was "physical work." Nor did he dispute that on October 23, 2015, his work restrictions included "limited standing or walking" and that on November 9, 2015, his work restrictions stated he "should work in a sit down job." Both status reports also stated that his "Expected Maximum Medical Improvement (MMI) date" was November 18, 2015.

In a November 24, 2015 status report -- not provided to CGI -- his Expected MMI date was extended to December 29, 2015, but his work restrictions included "Limited stooping and bending," "Limited kneeling or squatting," and "No Lift," and he rated his pain level as 8 out of 10. On November 30, 2015, Davis's Expected MMI date and work restrictions remained the same, but his pain had increased to a level of 9 out of 10. Davis additionally testified that sometime before Thanksgiving (November 26), he was told by a doctor that his 90-minute commute each way to work was worsening his sciatica, and the "doctor placed him off work for a week or two." While the record does not disclose exactly when this took place, timesheets included in the record show the last day Davis performed work for CGI was November 18, 2015. It is self-evident that if Davis were unable to drive to work and, even once there, unable to stoop, bend, kneel, squat, or lift things, Davis could not simultaneously comply with his medical restrictions and perform the essential duties of his job, regardless of any reasonable accommodation provided.

Davis disputes neither the physical nature of a pipefitter's job, nor the medical restrictions imposed on him. Instead, he argues that he was able to perform the essential duties of his job "as evidenced by the fact that he continued to work for the two months following his September 26, 2015 workplace injury, and only took very limited intermittent leave when his [s]ciatica would flare up." He also argues he would have been able to return to work had he been given a short leave of absence to heal. We are unconvinced.

First, Davis himself alleged in his complaint that he "was unable to work due to his injury . . . ." Moreover, while Davis testified that he often performed pipefitting work to keep up his hours, he also testified that he was unable to do that work "on a continuous basis."[3] In the face of this allegation and testimony, Davis cannot now claim that he actually could perform the essential duties of a pipefitter in spite of his injury. (See *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal. App. 4th 1264, 1271 ["'An admission in the pleadings . . . is a *waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues. Under the doctrine of "conclusiveness of pleadings," a pleader is bound by well pleaded material allegations or by failure to deny well pleaded material allegations'"].)

Second, Davis testified he was permitted to take off as much time as he felt necessary, but admitted that rather than go home and rest after finishing his "light duty" tasks, he often chose to stay and do pipefitting work to keep up his

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[3] Davis's citations to *Leuzinger v. Cnty. of Lake* (N.D.Cal. Apr. 30, 2007, No. C 06-0398 SBA) 2007 U.S. Dist. LEXIS 35955 (*Leuzinger*) and *Lennex v. Wal-Mart Stores East, LP* (W.D. Penn. Feb. 29, 2008, Civil Case No. 06-877) *Lennex*, 2008 U.S. Dist. LEXIS 117687 (*Lennex*) are inapposite. (See *Leuzinger*, 2007 U.S. Dist. LEXIS 35955, *16 [that correctional officer performed her job for nine months "without difficulties" and "without problem belies any contention that she is not able to do the job"]; *Lennex*, *supra*, 2008 U.S. Dist. LEXIS 117687, *23-*25 [summary judgment precluded when record suggested employee was able to perform his job satisfactorily for more than eight months].)

hours. Davis cannot now complain he would have been able to do his job were he given time off when the evidence is undisputed that he was permitted such time off and declined to take it.

(ii) Legitimate Reason for Termination

Even had Davis made a prima facie showing of disability discrimination, CGI proffered a legitimate reason for Davis's termination, and Davis failed to present sufficient evidence to permit a reasonable juror to find CGI's reason was a pretext for disability discrimination. CGI claims it discharged Davis because its biggest customer, Lockheed, "made clear that it only wanted California Guardian to have one pipe fitter working at Lockheed's facilities under the new contract." Davis did not dispute that Valdez was hired a year before him, and also "performed the duties of a fitter." Nor did Davis dispute that in his five months on the job, he had been cited for smoking on the Lockheed premises, leaving pump runs unattended, and failing to show up for a pump run because he overslept. Instead, Davis points to the fact that Lockheed's bid form, estimating the number of hours for various jobs required for the upcoming year, estimated it would need not only 1,500 straight-time hours for a pipefitter, but also 1,500 overtime hours, as well as 500 straight-time and 500 overtime hours for an apprentice pipefitter.

While the number of hours estimated in this bid form does raise a question of how many pipefitters Lockheed

believed it needed, Davila, the Lockheed employee who prepared the bid form and generally dealt with CGI (including verifying its employees' timesheets for work performed for Lockheed), declared under penalty of perjury that he "determined that the use of two fitters - Mr. Valdez and Mr. Davis - was unnecessary and economically wasteful for Lockheed" and "estimated that Lockheed only had need for one full-time fitter to perform the services for" the new contract. While Davis complains Davila failed to explain the numbers in the bid form, he offers no evidence to support an inference that Davila was mistaken or lying in his declaration. Moreover, the record is uncontradicted that CGI did not, in fact, hire a second pipefitter, leaving no reasonable basis to infer such a position was needed. Given Davila's unambiguous testimony, and the fact that CGI did not hire a replacement for Davis, we find the number of estimated hours listed in the bid form insufficient to permit a reasonable trier of fact to find that CGI's proffered reason for terminating Davis's employment was a pretext for disability discrimination.[4] The court did not err in granting summary adjudication as to this cause of action.

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[4] Davis also argues that pretext is shown because CGI "changed and expanded" its reasons for terminating his employment. Specifically, Davis alleges that, in its motion, "CGI stated that it chose to keep Valdez and lay off Davis based upon their respective tenure with CGI, as well as upon Davis'[s] alleged conduct during his employment—specifically, the incidents mentioned in Hernandez's September 17, 2015 email to
(Fn. is continued on the next page.)

2. Other Causes of Action (Failure to Prevent Discrimination; Wrongful Termination in Violation of FEHA/Public Policy)

In its motion, CGI argued that because Davis's claim for discrimination failed, there could be no liability for his fourth cause of action (failure to prevent discrimination) or for his sixth and seventh causes of action (wrongful termination in violation of FEHA and public policy). On appeal, Davis similarly contends that because the trial court erred in summarily adjudicating his discrimination claim against him, it also erred in doing the same on his claims for failure to prevent discrimination and wrongful termination. Because we conclude the court correctly adjudicated the discrimination claim against Davis, we similarly conclude it correctly adjudicated these claims against him as well.

Birkholz[,]" but "[t]he termination letter makes *no reference* to prior performance issues or concerns; it is solely stating that the decision is due to Lockheed's alleged request to lessen the hours for CGI's fitters." We see neither contradiction nor expansion. CGI's reason for reducing the number of pipefitters in its employ from two to one was the reduction of hours specified by Lockheed. CGI's reason for retaining Valdez over Davis was Valdez's seniority and Davis's past infractions.

B. *Accommodation Causes of Action*

1. Second Cause of Action (Failure to Accommodate)

"The elements of a failure to accommodate claim are (1) the plaintiff has a disability under the FEHA, (2) the plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1009-1010.) A reasonable accommodation is "'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.'" (*Id.* at 1010.) A reasonable accommodation can also include "[j]ob restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." (Gov. Code, § 12926, subd. (p)(2).)

In its motion, CGI argued both that Davis was unable to do a pipefitter's job due to his medical restrictions, and that CGI accommodated Davis to the extent possible by giving him all the paperwork it could, granting all the medical and sick leave requested, and not penalizing him if he needed to go home or was unable to do his job due to disability. On appeal, Davis argues: (a) CGI failed to establish the duties of a pipefitter; (b) Davis was able to do the essential functions of

his job; (c) CGI failed to consider Davis's request to restructure his job to permit him to do other work such as inspections, kitchen installations, or all the paperwork; and (d) the Lockheed bid form "had a new position budgeted on it, and there is no evidence that anyone at CGI considered that vacancy or offered it to Davis to see if he could perform that job . . . ." We are unpersuaded.

As to his first two arguments, as demonstrated above, CGI presented undisputed evidence that the primary duties of a pipefitter "consist[ed] of inspecting, maintaining, and repairing Lockheed's existing fire suppression systems, and making minor additions or modifications thereto." Moreover, it is evident that Davis could not even drive to his job, let alone perform its essential duties, without running afoul of his medical restrictions, regardless of what accommodations were given to him.[5]

Regarding restructuring his job either to do kitchen installs, fill out "all the paperwork," or perform more inspections, Davis himself testified that CGI already had an employee, "Paul," who performed kitchen installs. Moreover, Davis did not dispute that while Hernandez and Valdez had paperwork that could have been reassigned to Davis, doing so would have cut their hours. Similarly, restructuring Davis's job to include more inspections would necessarily have required restructuring other employees' jobs to do more of the

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[5] The one accommodation that he could have taken advantage of -- taking time off -- Davis often refused because he wanted to work more hours.

pipefitting work Davis had been hired to do. As Davis testified, "there was work to be done." ""The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights . . . .'"" (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745.)

Regarding reassigning Davis to the "new position" budgeted in the bid sheet, or any other potential position, it is undisputed that "[s]ince Davis was let go, [CGI] has not hired any other fitter or any employee in any capacity." "'A reassignment . . . is not required if 'there is no vacant position for which the employee is qualified.'" (*Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 1223.) If CGI hired no employee after Davis, it is self-evident there were no vacant positions to which Davis could have been reassigned.

CGI established that it had reasonably accommodated Davis, and Davis failed to present sufficient evidence to raise a triable issue of fact otherwise. Thus, the court did not err in granting summary adjudication on this cause of action.

2. Third Cause of Action (Failure to Participate in the Interactive Process)

Davis argues the court erred in granting summary adjudication on this cause of action because while CGI admittedly listened to Davis's suggestions on how to accommodate him, it failed to respond to some of his suggestions, and proposed no suggestions of its own.

We need not decide whether CGI sufficiently engaged in the interactive process because, as established above, there was no other reasonable accommodation CGI could have provided Davis. He was physically unable to do the pipefitter's job for which he was hired, he was permitted to take off all the time he felt he needed to recover from his injury, and CGI granted his request to do all the paperwork required in his job. Restructuring his job to include more inspections or other paperwork would have required restructuring his colleagues' jobs as well. Moreover, there were no vacant positions to which he could have been reassigned. "[A]n employer's failure to engage in the interactive process is an unlawful employment practice (i.e., gives rise to liability) only if a reasonable accommodation existed." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980.) Other than what CGI provided, no reasonable accommodation existed, and therefore, regardless of the adequacy of CGI's participation in the interactive process, it can give rise to no liability. Because Davis failed to provide sufficient evidence to establish a triable issue of fact as to the existence of a reasonable accommodation not provided him, the court did not err in granting summary adjudication on this cause of action.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.